

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 490 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

TUSHARBHAI BHANUPRASAD

Versus

HEIRS OF DECEASED SOLANKI JITUBHAI GHEMABHAI

Appearance:

MR JJ SHAH for Petitioner

MR MC SHAH for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 07/05/99

ORAL JUDGEMENT

This case has a very chequered history and parties are fighting litigations for more than three decades.

The facts giving rise to this petition are as under:

One Bai Kashi widow of Bhatt Someshwar Bhaishanker was the owner of suitland S. No. 164 Acre 5, Gunthas 33 situated in village Bechari, District Kheda. She was awarded possession of half of this land in the proceeding under section 32 T of the Act being Tenancy Application No. 1295 of 1962. She obtained actual possession of the land on 15.1.1964 which she cultivated thereafter through hired labours. Bai Kashi had adopted son one Bhupendra Someshwar Bhatt, the deceased father of the petitioner who succeeded to the land on her death in the year 1968 i.e. 30.10.68. After said Bhupendra's death, the petitioner who was a minor succeeded to his property including the suit land/ While Bhupendra was alive the respondent no. 2 trespassed upon the land and took illegal possession of the suit land and so the deceased Bhupendra filed a Civil Suit No. 83 of 1970 in the Court of Civil Judge (JD) Umreth for possession. The respondent no. 2 took up usual contention that he was a tenant, so the issue of tenancy was referred to Mamlatdar who ultimately held that the respondent no. 2 was not a tenant. After the decision of this issue, the matter was referred back to the Civil Judge who ultimately passed on 26.12.1977, a decree for possession in favour of the petitioner (as in meanwhile his father Bhupendra had died). The respondents no. 1 and 2 are the heirs of the original tenant Jitabhai Ghemabhai and they filed an application No. 28 of 1972 in the Court of Additional Mamlatdar and Agricultural Lands Tribunal, Anand under sec. 37 of the Act contenting that after the death of Bai Kashi her son Bhupendra had leased the land to the respondent no. 2 Rambhai Lallubhai in 1969-70 and, thus, had failed to cultivate the land personally and so they are entitled to restoration of possession. The application was numbered as 28/1972.

Learned Additional Mamlatdar allowed the application and directed that possession be delivered to the respondents no. 1 and 2. The Tenancy Appeal No. 63/73 was preferred to the District Deputy Collector by the petitioner and respondent no. 2 preferred Tenancy Appeal No. 94/73. The Tenancy Appeal No. 63/73 was dismissed and tenancy Appeal No. 94/73 was partly allowed by the Deputy Collector, Anand by his order dated 31.12.73. The petitioner filed Revision Application No. 138 and 139 of 1974 to the Gujarat Revenue tribunal and the respondent no. 2 filed Revision Application No. 95/75 to the Revenue Tribunal who by a consolidated order dated 6.9.74 allowed both the revisions No. 138 and 139 of 1974 of the petitioner and dismissed the revision application filed by the respondent no. 2 and remanded

the matter for fresh hearing on merits in light of his observations in the judgment and according to law.

The District Deputy Collector, Anand consolidated the two Tenancy Appeals No. 63 and 94 of 1973 and renumbered it as Tenancy Appeal No. 51 of 1975 and by his order dated 10.11.1976 dismissed the petitioner's appeal. The petitioner filed Revision Application No. Ten.B.A. 92/77 and the respondent no. 2 filed Revision Application No. 6 of 1977 to the Gujarat Revenue Tribunal. It was heard by the President, who by his order dated 4.5.1977 allowed it, and set aside the orders of the lower courts and remanded the case for fresh hearing.

The MAmLatdar, Anand, numbered the case as Tenancy Case No. (Bechari) 90/77 and by his order dated 9.3.79 allowed the application and directed that the possession of the field should be handedover to the respondent no. 1 and 2. The petitioner filed Tenany Appeal No. 3098/80 and the respondent no. 2 filed Appeal No. 3114 of 1980 to the Deputy Collector, Kheda, who by a common order dated 25.10.81 dismissed both the appeals. The petitioner filed a Revision Application No. 1369 of 1982 to the Gujarat Revenue Tribunal and the respondent no. 2 filed Revision Application No. 613 of 1982. Both these revision applications were dismissed by the Gujarat Revenue Tribunal by its consolidated order dated 21.10.1983. These orders of Mamlatdar, Deputy Collector and Gujarat Revenue tribunal are at Annexures-C,D and F respectively, challenged in this petition by the petitioners.

Mr BJ Jadeja, learned advocate appearing for the petitioner after inviting my attention to the relevant provisions of Section 37 of the Bombay Tenancy and Agricultural Lands Act, 1948, has submitted that the finding recorded by the authorities below are perverse that deceased Bai Kashi was not cultivating the land. In the submission of Mr. Jadeja, the authorities below have failed to appreciate that the respondent no. 2 was declared trespasser by the competent Civil Court against which no appeal has been preferred and, therefore, he is not a tenant of the suit land and, therefore, the possession of the land was by way of trespasser. My attention has been invited by Mr. Jadeja to the abstracts of the Revenue records showing that the land was personally cultivated by deceased Bai Kashi till her life time. Now in the present case, there is no dispute to the fact that Bai Kashi who was the owner of the suit land being Survey No. 164, Acre 5, Gunthas 33 of village

Bechari was awarded possession of half of the lands in the proceedings under section 33(2)(T) of the Act and she obtained actual possession of the land on 15.1.1964. Section 37 which is relevant for our purpose, requires the landlord to restore the possession, if he fails to cultivate the land within one year. Section 37(1) reads as under:

Section 37(1): If after the landlord takes possession of the land after the termination of the tenancy [under section 31] [or 32T] he fails to use it for any of the purposes specified in the notice given under [section 31 [or 32T] within one year from the date on which he took possession or ceases to use it at any time for any of the aforesaid purposes within twelve years from the date on which he took such possession, the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him, unless he has obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or has offered in writing to give possession of the land to the tenant on the same terms and conditions and the tenant has failed to accept the offer within three months of the receipt thereof.

Reading the said provision, it is clear that the landlord who takes possession of the land after termination of tenancy under sec. 31 or 32(T) fails to use for any other purposes specified in the notice within one year from the date on which he took possession or ceases to use it at any time for any of the aforesaid purposes within twelve years from the date on which he took such possession, he shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him. The rest of the comments to the section to which we are not concerned is not necessary. In other words, the landlord is required to use the land within one year from the date on which the possession was taken. In the instant case, Bai Kashi obtained the possession for her personal cultivation. It is the say of the respondents no. 1 and 2 that the land was never cultivated by her till her life time and, on the contrary, after her death on, 30.10.1968

Bhupendraprasad father of the petitioner has, in fact, transferred the land in favour of respondent no. 2-Patel Rambhai Lallubhai. It is, therefore, the contention of the respondents no. 1 and 2 that as the original landlord has failed to cultivate the land personally, the original tenants are entitled to recover the lands under section 37(1) of the Act. The authorities in the instant case, have also recorded a finding that from the record it does not appear that deceased Bai Kashi cultivated the land personally and, therefore, decided the proceeding in favour of respondents no. 1 and 2. My attention has been invited by Mr. Jadeja to the abstracts of village Form No. 7/12 for the land in question. Having seen the same, it is clear that the name of Jitabhai Gemabhai father of respondents no. 1 and 2 is shown as a tenant/occupier of the land in question from 1950-51 to 1963-64. It is also mentioned that on 26.2.1964 in presence of panchas, the possession of the land was given to the landlord i.e. Bai Kashi from 1964 and, accordingly the name of Bai Kashi has entered in the column of records of rights from 1964-65, which continued up to 1968-69. It is also clear that she has cultivated the land and has yielded agricultural produce namely Bajri, Jiwar etc. For the year 1969-70 by way of pencil entry, the name of respondent no. 2 was entered and was in fact entered in the year 1970-71. It is not in dispute that the civil suit was filed in the month of MARCH, 1970, no sooner this pencil entry was made by the Talati-cum-mantri showing the name of respondent no. 2-Patel Rambhai Lallubhai in a civil court for a declaration and possession of the land in question. In view of the evidence in form of documents, it is not possible for me to accept the finding recorded by the authorities that deceased Bai Kashi has failed to cultivate the land within one year and, therefore, the land must go to the tenant i.e. respondents no. 1/1 and 1/2. Apart from that, the revenue authorities has failed to consider that respondent no. 2-Patel Rambhai Lallubhai has committed criminal trespass as he is not tenant as held by the tenancy authorities as well as the civil court and, therefore, it cannot be held that the deceased father of the petitioner transferred the possession of the land to the respondent no. 2. Once the third party trespasses upon the land, it is not possible for the landlord to cultivate until the trespasser is removed by law and that has been done in the instant case when the deceased father of the petitioner, in fact, filed a suit in the year 1970 to remove respondent no. 2 from the land. In any case, from the records, it is clear that during the life time, the original landlord was in fact, cultivating the land

in question. The respondents no. 1/1 and 1/2 are not entitled to get the possession under section 37(1) of the Act. Miss Falguni Kaystha learned advocate appearing for the respondents submitted that the authorities below after considering the evidence on record, have recorded certain finding based on the facts, it is not open for this court to substitute its own finding while exercising its powers under Article 227 of the Constitution of India. To substantiate her submission, a reliance is placed on the decisions of the Supreme Court in the case of S.J. Ebenezer v. Delayudhan & Ors., AIR 1998, p.746 and in the case of Babhutmal Raichand Oswal v. Laxmibai R. Tarte, AIR 1975, p. 1297. There cannot be any dispute with respect to the principle laid down in the judgment of the Apex Court. However, once this court finds that the authorities below have totally closed their eyes on the documents in the form of revenue records showing the name of the landlady as cultivator and recorded a finding that there is nothing on record to show that the landlady in fact, cultivated the land in question, this petition cannot be rejected on the ground that this Court cannot consider the material evidence on record. In any case, I am not substituting my own finding, but my finding is based on the documents which is totally ignored by the authorities below and, therefore, the impugned orders passed by the Mamlatdar, Deputy Collector and Gujarat Land Revenue Tribunal at ANNEXURES-C, D & F are required to be quashed and set aside.

In the result, this petition is allowed. The impugned orders Annexures-C, D, & F are quashed and set aside. Rule made absolute accordingly with no order as to costs.

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